

## VIA ELECTRONIC MAIL

February 3, 2014

Marcia E. Asquith  
Office of the Corporate Secretary  
FINRA  
1735 K Street, NW  
Washington, DC 20006-1506

### **Re: Regulatory Notice 13-34: Request for Comment on Proposed Funding Portal Rules**

Dear Ms. Asquith:

On October 23, 2013, the Financial Industry Regulatory Authority (FINRA) published a request for comment on a set of proposed rules and related forms (collectively, the Funding Portal Rules) for SEC-registered funding portals that become FINRA members pursuant to the equity crowdfunding provisions of the Jumpstart Our Business Startups Act (JOBS Act).<sup>1</sup> As proposed, the Funding Portal Rules provide a streamlined process tailored to the limited scope of activities that SEC-registered funding portal would be permitted to engage in.

The Financial Services Institute<sup>2</sup> (FSI) appreciates the opportunity to comment on this important proposal. FSI and its members support the proposed goals of equity crowdfunding included in the JOBS Act. Legislative and regulatory efforts that increase American job creation and facilitate capital formation and entrepreneurship are to be encouraged, particularly for individuals and businesses that do not have ready access to capital through more traditional channels. However, FSI and its members have concerns with some aspects of equity crowdfunding that can be suitably addressed through additional guidance from FINRA and other regulators. Specifically, firms and advisors who have no interest in participating or engaging with crowdfunding offerings and intermediaries require additional information and guidance in order to avoid regulatory violations and liability for clients' investment losses in crowdfunding offerings.

#### Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a

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<sup>1</sup> Regulatory Notice 13-34, Jumpstart Our Business Startups (JOBS) Act, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p370743.pdf>.

<sup>2</sup> The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 100 Broker-Dealer member firms that have more than 138,000 affiliated registered representatives serving more than 14 million American households. FSI also has more than 35,000 Financial Advisor members.

fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisers are especially well positioned to provide middle-class Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

In the U.S., approximately 201,000 independent financial advisers – or approximately 64 percent of all practicing registered representatives – operate in the IBD channel.<sup>3</sup> These financial advisers are self-employed independent contractors, rather than employees of the IBD firms. These financial advisers provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisers are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisers affiliated with IBDs is comprised of clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisers are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.<sup>4</sup> Independent financial advisers get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisers have a strong incentive to make the achievement of their clients' investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisers. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisers play in helping Americans plan for and achieve their financial goals. FSI's primary goal is to ensure our members operate in a regulatory environment that is fair and balanced. FSI's advocacy efforts on behalf of our members include industry surveys, research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

### Comments

FSI appreciates the opportunity to provide comments on the proposed Funding Portal Rules. We offer similar comments to FINRA on this proposal as we have submitted to the SEC regarding S7-09-13: Proposed Crowdfunding Rules.<sup>5</sup> While we support the intended goals of equity crowdfunding as articulated by its supporters, there remain concerns regarding the scope of liability to firms and advisors who do not wish to engage in equity crowdfunding. Of the IBD member firms polled by FSI, none have plans to participate in equity crowdfunding in any fashion, including as funding portals. However, firms and advisors believe that the proliferation of equity crowdfunding offerings and the high visibility of these investments through internet

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<sup>3</sup> Cerulli Associates at <http://www.cerulli.com/>.

<sup>4</sup> These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisers.

<sup>5</sup> SEC Proposed Rules, “Crowdfunding,” Federal Register, Vol. 78, No. 214, November 5, 2013, p. 66428. Release Nos. 33-9470 and 34-70741; File No. S7-09-13 available at <http://www.sec.gov/rules/proposed/2013/33-9470.pdf>

platforms pose a liability risk in instances where clients approach advisors regarding an interest to invest in crowdfunding offerings.

For example, an investor interested in investing in a crowdfunding venture may approach their financial advisor with directions to liquidate some of their existing investments and tell their advisor they plan to invest the money in a crowdfunding venture. If the client later loses their investment in the crowdfunding venture, they may then place blame on their financial advisor for failing to advise them of the risks or for failing to advise them against investing. Even if the investor did not inform their advisor of their intention to invest in a crowdfunding venture, the investor may claim the advisor should have inquired and advised them against investing. Other examples might include a client simply asking their advisor about a crowdfunding venture and assuming the resulting conversation constitutes financial advice. FSI members are concerned about these scenarios resulting in investors filing claims against advisors and the firms in order to recover their lost investment, even though the advisors and firms were not in any way involved in the crowdfunding venture.

Correspondingly, FSI provides the following comments:

- **Request for Regulatory Guidance:** FSI requests clear guidance regarding advisor and firm liability with respect to investment losses in equity crowdfunding offerings. FINRA should work with the SEC to provide information regarding the scope of liability for firms and advisors when an advisor is approached by a client with an inquiry regarding an investment in an equity crowdfunding offering.
- **Request for Model Waiver Language:** FSI believes that FINRA and the SEC should work together to release model waiver of liability language that advisors can provide to clients with respect to equity crowdfunding. The language could be provided to a client at the time they discuss crowdfunding with their advisor or shortly thereafter.
- **Request for Educational Website on Crowdfunding:** FINRA, perhaps in conjunction with the SEC, should also provide information regarding crowdfunding and the associated risks on a website. Potential investors could access the website to learn more about crowdfunding and firms could easily direct clients to the website in the waiver language or in other educational efforts.
- **Retrospective Review of Funding Portals:** FSI and its member continue to support FINRA's efforts to conduct economic impact assessments and cost-benefit analysis for proposed and current rules. FINRA's efforts in this regard have been welcome and encouraging, including last year's hiring of FINRA's Chief Economist as well as the publication of the Framework Regarding FINRA's Approach to Economic Impact Assessment for Proposed Rulemaking.<sup>6</sup> The proposed Funding Portal Rules provide an excellent opportunity for FINRA to conduct a retrospective economic impact assessment due to the unprecedented divergence between traditional broker-dealer practices and the provisions of the JOBS Act related to equity crowdfunding. Any such retrospective economic assessment should examine whether the relaxed funding portal rules were actually effective in protecting investors or whether additional requirements should be adopted to improve investor protection.

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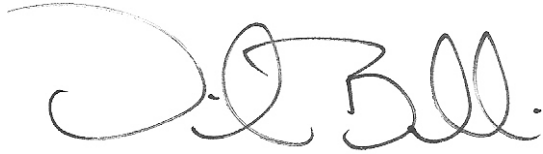
<sup>6</sup> Framework Regarding FINRA's Approach to Economic Impact Assessment for Proposed Rulemaking, available at <http://www.finra.org/web/groups/industry/documents/industry/p346389.pdf>.

Conclusion

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with FINRA on this and other important regulatory efforts.

Thank you for your consideration of our comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" followed by "Bellaire".

David T. Bellaire, Esq.  
Executive Vice President & General Counsel